United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2566

ORIGINAL

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P/S

To be argued by
JULIA P. HEIT

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

DAVID GARTNER,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

APPELLEE, :

-against- : DOCKET NO.: 74-2566

DAVID GARTNER, :

APPELLANT. :

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STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered November 22, 1974 in the United States District Court for the Southern District of New York (Stewart, J.) convicting appellant after a non-jury trial of conspiracy [Title 21 U.S.C. Sec. 812, 841 (a)(1), 841 (b)(1)(A)], possession of cocaine with intent to distribute same [Title 21 U.S.C. Sec. 812, 841 (a)(1), 841 (b)(1)(A)], and perjury [Title 18 U.S.C. Sec. 1623]. Appellant was sentenced on the conspiracy count to a term of imprisonment of six months and special parole for three years. On the possession and perjury counts, he was sentenced to a probationary term for three years with the execution of these latter sentences suspended. All sentences were directed to run concurrently.

Execution of sentence was stayed pending appeal.

QUESTION PRESENTED

WHETHER THE LAWLESS CONDUCT OF THE GOVERNMENT AGENT IN DELIBERATELY AND SURREPTITIOUSLY TAPING A CONFERENCE BETWEEN APPELLANT GARTNER AND HIS ATTORNEY, THEREBY DIRECTLY INTERFERING WITH THE ATTORNEY-CLIENT RELATIONSHIP, IS SO OFFENSIVE TO THE ADMINISTRATION OF JUSTICE THAT THIS COURT IN THE EXERCISE OF ITS SUPERVISORY POWERS AND AS A MATTER OF DUE PROCESS SHOULD DISMISS THE INDICTMENT.

STATEMENT OF FACTS

On September 3, 1974, appellant proceeded to trial before the Hon. Charles E. Stewart on an indictment charging him with the crimes of conspiracy [Title 21 U.S.C. Sec. 812, 841 (a)(1), 841 (b)(1)(A)], possession of cocaine with intent to distribute the same [Title 21 U.S.C. Sec. 812, 841 (a)(1), 841 (b)(1)(A)], and perjury [Title 18 U.S.C. Sec. 1623].** Appellant waived his right to a jury trial and agreed to be tried by the court.

At the outset of the trial, appellant's counsel, Mr. Bloom, informed the court that Stephen Diskin, a co-defendant, and appellant had previously pleaded guilty to a superceding information but thereafter appellant was permitted to withdraw his plea. (3)* According to counsel, two days before appellant was to be sentenced and before the withdrawal of his plea, appellant and he went to Diskin's apartment on May 30, 1973 pursuant to Diskin's invitation to discuss possible trial strategy. However, unbeknownst to both, Mr. Diskin had decided to co-operate with the Government in an attempt to get information about appellant- i.e., to get him to make an admission or to get him involved in some illegal activity. (4) Accordingly, Diskin permitted a Government Agent to secretly record their discussions in his apartment on that day. (4, 5)

Mr. Bloom therefore claimed that such actions interfered with the attorney-client relationship. (5) The Government in

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* Numerical references are to the pages of the trial transcript.
** The indictment is set forth in its entirety in the Appendix, A. 7-12.

turn admitted that although the initial overtures for the meeting were made by Mr. Bloom and appellant, it was Diskin who got them to come to his apartment. (21) The court at this point stated that it was seriously concerned with the Governmental taping of a conversation in which counsel for a defendant is a participant. (24)

During the trial, Stephen Diskin admitted that when Mr. Bloom and appellant arrived at his home on May 30, 1973, Agent Hall had asked his permission to secretly record any conversations. (179) He did not know what information Agent Hall was interested in obtaining. (205) Mr. Diskin also acknowledged that since he had intended to be a witness in appellant's behalf, a motion to sever his trial from that of appellant's had been made and granted. (203)*

Agent Hall likewise admitted that he secretly taped a conversation in Diskin's apartment on May 30, 1973 involving Mr. Bloom, Diskin, and appellant. (381) He further stated that it was entirely his idea to tape this conversation. (381) Agent Hall explained that he was suspicious of Mr. Bloom's motives in asking to meet with Diskin since Diskin was an informant and was co-operating with him. He thought that either Bloom or appellant was going to ask Diskin to lie. (381) Finally, Agent Hall stated that he was aware at this time that appellant was under indictment and that Mr. Bloom was his lawyer. (383)

After appellant was convicted as charged, Mr. Bloom moved

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* In a motion dated November 19, 1973, Mr. Bloom moved for an order severing appellant's case from that of the other defendants. In support of this motion, counsel asserted that Diskin could and would give evidence that would exculpate appellant and that he was a critical witness in appellant's behalf.

to set aside the verdict on the ground, inter alia, of Governmental interference with the attorney-client relationship.

The court on November 21, 1974 denied the motion in an opinion set forth in the Appendix. (A.13-20)

GOVERNMENT's CASE

On June 22, 1972, Special Agent John H. Diez and another Agent met with a Mr. Otte in a boutique in New Jersey in order to purchase cocaine from him. (45) Otte told them that he could supply one half of a pound of cocaine for $5,500 and that his connection's name was Donald. (45, 46) On July 5th, the Agents again met with Otte and received a sample of cocaine. (47) The next evening, Otte took Agent Diez to the home of Donald Brandt who told the Agent that he could get them the cocaine in a few days. (49)

Thereafter, on July 10, 1972, Agent Diez learned from Otte that Brandt would be unable to supply the cocaine but someone else, Tom Veenstra, would supply them with the drug. (50) When they discussed the matter with Veenstra, he told them that they would have to go to Queens in New York City to pick up the cocaine.

Accordingly, Agents Jorgenson and Diez followed Veenstra, Otte, and a Martha Parashac to Queens. In an apartment there, they met Stanley Silverstein and Tom Parashac who told the Agents that his supply was in Manhattan. Consequently, from that address, they went to 85 Walker Street in Manhattan. Agent Diez left Agent Jorgenson in the car with the money and entered the apartment

where he met Baletti. (51) When Baletti pulled out five bags representing that it contained cocaine, Agent Diez pretended to test it. (52) Silverstein then insisted that they bring the money into the apartment to complete the transaction. (52) Agent Diez returned to the car and gave a pre-arranged signal to other surveillance agents who placed Otte and Veenstra under arrest. (51, 52) Baletti was arrested in the apartment.

While the Agents were interviewing Baletti in his apartment, the telephone rang. Agnet Hall answered it and Agent Diez listened in on the extension. (53, 350) According to the Agents, someone identified himself as "Dave" and asked if Jesse were there. Agent Hall told the man that Jesse was busy and that he should come up to the apartment but the person refused and said he would call back in fifteen minutes. (54) After the Agents had obtained Baletti's co-operation, the phone rang again. This time Baletti answered the phone and Diez listened on the extension while Agent Hall listened next to Baletti. The person on the other end identified himself as "Dave" and asked if everything went well that night.* When Baletti asked him to come up to the apartment, the person declined. (54, 351) It was agreed that they would meet instead 20 minutes later at Broadway and Canal Street. It was at this locale that appellant and Diskin were arrested. (55, 56)

STEPHEN DISKIN first met appellant in early 1969 at the New York Playboy Club where they both were employed. He and appellant engaged in a two-fold business - photograph[illegible]nd cocaine

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*These telephone calls provided the basis of the perjury charges against appellant. Before the Grand Jury, appellant had denied stating that is name was David or identifying himself to anyone over the telephone. He also denied asking Bambu if everything went o.k. (441)

dealing. Together they engaged in approximately four to five cocaine transactions. (100, 101)

According to Diskin, he was present when appellant sold cocaine to Baletti (a/k/a Jesse Bambu) on three or four different occasions in appellant's apartment. (108) The last transaction took place during the end of the first week in July of 1972. (108)

On July 10th, when Diskin was in appellant's apartment, appellant called Bambu. Appellant said that Bambu told him that the cocaine would be sold that night and that he would be paid that evening. Bambu also told appellant to come to his house around 10.00 p.m. (111) He and appellant first picked up some Met baseball tickets that night and then appellant called Bambu from a phone booth. After this conversation, appellant told Diskin that something sounded "fishy". (111) After driving past Bambu's house,appellant again telephoned him to tell him that they would meet at a local egg cream parlor in the vicinity. It was at this locale that both Diskin and appellant were arrested. (113)

Diskin admitted that he had been indicted both for perjury before the Grand Jury, conspiracy, and possession of cocaine. He had already pleaded guilty to the conspiracy charge. (114)

On cross examination, Diskin stated that he had told Mr. Bloom and appellant in front of Bloom's house in appellant's volkswagen that not only did they pick up Met tickets but that they were also to pick up some money from Bambu. This was before he had pleaded guilty. (126-127)

When asked if he ever used marijuana, the witness replied "you gave me a marijuana cigarette in your home". (183)

This, according to Diskin, was in the presence of both appellant and Bloom's wife. (186) Because of this answer, Mr. Bloom felt compelled to question the witness extensively regarding the circumstances surrounding his alleged giving of the marijuana cigarette. (187-194) Diskin asserted that Mr. Bloom had asked if he would like to relax with a joint. (188) This incident pertaining to the marijuana occurred shortly before he had pleaded guilty on December 18, 1972. (202)

EDWARD BALETTI, also known as Jesse Bambu, had pleaded guilty to the indictment and received a one year sentence. (292) During the early and later part of 1972, he had engaged in several narcotic transactions with appellant. (293)

On July 10, 1972, he had cocaine in his possession when he was arrested. (293-294) He had gotten that cocaine the same day from appellant and had given him about $500 to $800. Since he owed appellant more money, he was to pay him that night. (294) However, he was arrested when he attempted to sell these drugs to an undercover agent. (295) Appellant then telephoned when the Agents were there and asked if everything went o.k. and stated further that they would meet that night at a specified location. (296)

At the close of the Government's case, Mr. Bloom argued in part that Diskin's testimony regarding the marijuana was merely an attempt to embarrass him in front of the court. (473) The Government objected to this comment, claiming that counsel was injecting his own credibility into the case. The court agreed. (474)

At the conclusion of the entire case, appellant was found guilty as charged.

ARGUMENT

POINT I

THE LAWLESS CONDUCT OF THE GOVERNMENT AGENT IN DELIBERATELY AND SURREPTITIOUSLY TAPING A CONFERENCE BETWEEN APPELLANT GARTNER AND HIS ATTORNEY, THEREBY DIRECTLY INTERFERING WITH THE ATTORNEY-CLIENT RELATIONSHIP, IS SO OFFENSIVE TO THE ADMINISTRATION OF JUSTICE THAT THIS COURT IN THE EXERCISE OF ITS SUPERVISORY POWERS AND AS A MATTER OF DUE PROCESS SHOULD DISMISS THE INDICTMENT.

It is deeply rooted in our concepts of due process of law that the Government of the United States must not, in its zeal to apprehend criminals, itself become a law breaker. It is fundamental to those concepts that there are limits to the permissible conduct of Government Agents in the investigation of crime. Simply stated, the ends do not justify the means. Elkins v. United States, 364 U.S. 206, 223 (1960); Berger v. United States, 295 U.S. 78, 88 (1935).

In this case, it is apparent that Agent Hall was of the opinion that the ends did justify the means when he deliberately and surreptitiously taped a conference among Appellant Gartner, his attorney (Mr. Bloom), and co-defendant Diskin. While Diskin at this time was working with the Government and thus permitted the Agent to use his premises to conduct the surveillance, it is clear that appellant and his counsel were totally unaware of the Agent's presence as they discussed crucial trial strategy.

Consequently, the sole question on this appeal revolves around the remedy to be afforded the defendant who falls victim to such a practice. We submit that the only effective deterrent

against such a blatant encroachment upon the attorney-client relationship would be a rule requiring the per se dismissal of the indictment where such a practice is shown to have occurred.

There can be no question but that the attorney-client relationship is crucial to our adversary system of justice. A defendant who is charged with a crime by the Government must be able to consult freely with his counsel without any interference from his accusors. Likewise, counsel must be free to advise his client. The Sixth Amendment right to counsel can have no meaning if the parties cannot, without inhibition, freely and privately discuss all matters relating to the charges. Once the Government, however, is permitted to intrude at will upon the sacred fiduciary relationship between an attorney and client, such an intrusion, if sanctioned, would eventually destroy our adversary system of justice. There can be no adversary system if attorney and client can no longer consult freely, if they must be wary whether "Big Brother" Government is spying on them by some sophisticated eavesdropping method, or if they must have any fear of reprisal eminating from their discussions. Government intrusion into the attorney-client relationship, if unchecked, will no doubt have a very "chilling" effect on the ability of an attorney to effectively represent his client.

Agent Hall's conduct in deliberately and surreptitiously taping the conversation between appellant and his attorney cannot be justified under any existing theory of law. Agent

Hall frankly admitted that not only was it his idea to record the conference but that he was also well aware that Mr. Bloom was appellant's counsel. He did, however, attempt to mitigate his culpability by claiming that he thought that either Mr. Bloom or appellant was going to ask Diskin to lie. Clearly acceptance of such a flimsy excuse would give the Government license to interfere at any time with the attorney-client relationship under the guise that they thought, however erroneously, that the attorney and client were about to engage in some wrong.

Moreover, what makes Agent Hall's conduct so particularly egregious is that it was so unnecessary since the Government already had sufficient evidence to secure appellant's conviction. If the Government can so recklessly and wantonly invade the privacy of the attorney and his client where there is sufficient evidence to convict, they certainly would not hesitate to so act in a case where perhaps the evidence was not quite as strong.

Although this Court on occasion has discussed the applicability of the per se rule of dismissal, this Court has never been directly confronted with a case, such as the present one, wherein it is conceded that the Government deliberately interfered with the confidentiality of the attorney-client relationship.

In United States v. Arroyo, 494 F.2d 1316 (2d Cir., 1974), the defendant claimed that a Government informant, after the indictment had been returned, improperly had attended the

meetings of the two defendants and their lawyers, thus violating their Sixth Amendment right to a confidential attorney-client relationship. Relying on the assurances of the Government that no information passed to the prosecution team, that the informant had been mistakenly indicted, and that they did not in any way compromise the defense, this Court was of the opinion that application of a per se rule of dismissal without any showing of prejudice would be unwarranted. The Court did specifically note in a footnote, however, that a different problem would have been presented if privileged information had passed to the prosecution. In this case, as distinguished from Arroyo, there was a deliberate interference by a Government Agent into the attorney-client conference and as a result, privileged information did reach the Government.

In United States v. Rosner, 485 F.2d 1213 (2d Cir., 1973), this Court refused to grant the relief sought only because no unlawful intrusion by the Government was found. Instead, the co-defendant, who betrayed the defendant, was not at that time a Government Agent. Accordingly, the Court warned that an attorney and his client who meet with potential co-defendants in a criminal case always expose themselves to the risk of subsequent disloyalty by the co-defendant. Hence, this Court again felt it unnecessary to determine the question that is so squarely presented in this case. Nevertheless, the Court in speaking of the applicability of the per se rule of dismissal, stated clearly that "if circumstances warranted it, we would not shrink from such a result." 485 F.2d at p. 1229.

And finally, in United States v. Mosca, 475 F.2d 1052 (2d Cir., 1973), it was found that although a co-defendant was permitted to attend defense conferences, the Government never received any information from him regarding strategy. See also United States v. Zarzour, 432 F.2d 1 (5th Cir., 1970) [7] where the Fifth Circuit unequivocally stated that an intrusion by the Government upon the confidential relationship between a criminal defendant and his attorney is a violation of the Sixth Amendment right to counsel, but first there must be an intrusion.

In essence, this Court should find, as opposed to the above cited cases, that the pervasive conduct of the Government in this case in deliberately interfering with the confidential relationship between appellant and his counsel presents such a danger to our adversary system of justice that the only effective way to guard against the recurrence of such conduct is a dismissal of the indictment.

The Court of Appeals for the District of Columbia has previously considered the precise issue raised in this case and has squarely held that Governmental interference with the attorney-client relationship constitutes such gross misconduct that, irrespective of any prejudice to the defendant, the indictment would be dismissed. Se Caldwell v. United States, 205 F.2d 879 (D.C., 1953); Coplon v. United States, 191 F.2d 749, (D.C., 1951). Specifically, the Court in Caldwell warned:

> The Constitution's prohibitions against unreasonable searches and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the

> Government can with impunity place a secret Agent in a lawyer's office to inspect the confidential papers of the defendant and his advisors, to listen to their conversations, and to participate in their counsels of defense. 205 F.2d at p. 881

Additionally, the United States Supreme Court in Hoffa v. United States, 385 U.S. 293 (1966) cited with approval both the Coplon and Caldwell cases stating "We may assume that the Coplon and Caldwell cases were rightly decided." 385 U.S. at p. 307.

Additionally, this Court in determining whether an indictment should be dismissed, stated in United States v. Toscanino, 500 F.2d 267, 276 (2d Cir., 1974):

> In this case we may rely simply upon our supervisory power over the administration of justice . . . Clearly, this power may legitimately be used to prevent district courts from becoming willing 'accomplices in willful disobedience of law' . . . Moreover, the supervisory power is not limited to the admission or exclusion of evidence, but may be exercised in any manner to remedy abuses of a district court's process.

As in Toscanino, this Court's "supervisory power over the administration of justice" should be exercised in this case both to cleanse the court process of the prosecutorial pollution and, as a prophylactic measure, to deter such abuse in the future. Such extreme measure is justified when "mere admonitions are insufficient to prevent repetition of abuse". United States v. Mosca, 475 F.2d at p. 1059.

In this regard, it cannot be overemphasized that in Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court, after years of

frustrating experience with less drastic judicial remedies for police abuse of Fourth Amendment rights, reluctantly acted to deter such abuses by excluding from trial evidence obtained in violation of such rights.

It is submitted that the only effective deterrent against such Governmental misconduct as occurred in the present case is a rule barring prosecutions in such case. Accordingly, the conviction of appellant should be reversed and the indictment against him dismissed.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

RESPECTFULLY SUBMITTED,

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JULIA P. HEIT
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A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

US COURT OF APPEALS: SECOND CIRCUIT

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USA,
Appellee,

- against -

Affidavit of Personal Service

DAVID GARTNER,
Defendant-Appellant.

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York
That on the **22nd** *day of* **January** *1975 at* **Foley Sq Square, New York**

deponent served the annexed Brief *upon*

Paul Curran

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this **22nd**
day of **January** *1975*

Robert T. Brin

James Steele
JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975